

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Kimberly Ryan,

10 Plaintiff,

11 v.

12 eXp Realty LLC,

13 Defendant.  
14

No. CV-20-00325-PHX-GMS

**ORDER**

15  
16 Pending before the Court is Kimberly Ryan's ("Plaintiff") Motion in Limine  
17 (Doc. 79) and Plaintiff's Unopposed Motion to Reschedule Oral Argument Currently Set  
18 on February 25, 2022 (Doc. 84). For the reasons below, Plaintiff's Motions are denied.

19 **BACKGROUND**

20 Plaintiff is suing eXp Realty ("Defendant") for (1) breach of contract; (2) violating  
21 the Arizona Wage Act; and (3) promissory estoppel. (Doc. 1.) The Court denied summary  
22 judgment, and the case is set for trial beginning on May 24, 2022. (Doc. 75.) During  
23 discovery, Plaintiff deposed Scott Petronis, an out-of-state witness. (Doc. 34.) The  
24 deposition was conducted and recorded via the video teleconference software Zoom, and  
25 it was transcribed by a Court Reporter. (Doc. 79 at 1.) Plaintiff now wishes to present Mr.  
26 Petronis by deposition at trial. (Doc. 79 at 2.) However, instead of using the Court  
27 Reporter's transcript, she would like to use the Zoom recording of the deposition "in sync  
28 with the certified transcript." (Doc. 79 at 1.) Defendant has objected, arguing that the

1 video recording cannot be used because there was no certified videographer present at the  
 2 deposition. (Doc. 82 at 1.) Defendant did not contemporaneously object to the lack of  
 3 videographer. (Doc. 79 at 2); (Doc. 82 at 3).<sup>1</sup>

#### 4 DISCUSSION

5 “Unless the parties stipulate otherwise, a deposition must be conducted before an  
 6 officer appointed or designated under Rule 28.” Fed. R. Civ. P. 30(b)(5)(A). “Within the  
 7 United States, . . . a deposition must be taken before: (A) an officer authorized to administer  
 8 oaths either by federal law or by the law in the place of examination; or (B) a person  
 9 appointed by the court where the action is pending to administer oaths and take testimony.”  
 10 Fed. R. Civ. P. 28(a)(1). The officer must “certify in writing that the witness was duly  
 11 sworn and that the deposition accurately records the witness’s testimony.” Fed. R. Civ. P.  
 12 30(f)(1). “These procedures are designed to ensure that a neutral individual administers  
 13 the oath and that the deposition is an accurate reflection of the witness’s testimony.” *Alcorn*  
 14 *v. City of Chicago*, 336 F.R.D. 440, 442 (N.D. Ill. 2020).

15 Here, no party contests that the deposition was conducted without a certified  
 16 videographer. Although an issue of first impression in this Circuit, the district court in  
 17 *Alcorn v. City of Chicago* faced this exact issue and reasoned that the lack of videographer  
 18 would make Zoom recordings inadmissible. 336 F.R.D. at 444 There, the Court Reporter  
 19 refused to certify the accuracy of the Zoom recording because “it is a certified  
 20 videographer,” not the Court Reporter, “who has the appropriate training to serve as the  
 21 Rule 28 officer, and ensure that a video deposition is properly recorded with established  
 22 procedures to go on or off the record, limit noise and interruptions, address technical  
 23 glitches, and frame the camera view on the witness.” *Id.* at 443. Notably, had a certified  
 24 videographer been present at Mr. Petronis’s deposition, they would have no doubt  
 25 instructed the parties to use “Spotlight View,” which would have pinned the deponent’s

---

26 <sup>1</sup> The Court ordered a Telephonic Status Conference on this Motion on February 15, 2022,  
 27 setting the conference for February 25. (Doc. 83.) Plaintiff later filed Plaintiff’s  
 28 Unopposed Motion to Reschedule Oral Argument Currently Set for February 25, 2022.  
 (Doc. 84.) Because this is Plaintiff’s Motion, and Plaintiff is requesting expedited  
 consideration, the Court will rule based on the briefs. Accordingly, Plaintiff’s Motion is  
 denied.

1 video feed as the one to be recorded. Instead, portions of the video are recorded with a  
 2 screen share taking up most of the window; specifically, an exhibit is shown on more than  
 3 half of the screen, and the deponent's video feed is small and difficult to see. (Doc. 82-1  
 4 at 2.) This view will be unhelpful for a jury because the deponent's body language is barely  
 5 visible.

6 Although the Court recognizes that Defendant failed to object pursuant to Rule  
 7 32(d)(3)(B), Plaintiff has given no assurances of the amount of time the deponent's feed is  
 8 minimized because an exhibit is displayed. Nor does Plaintiff explain how she plans to  
 9 account for this problem. Leaving the video recording in this view for the jury will be  
 10 unhelpful, and switching between the transcript and the video recording will be distracting.  
 11 Given that the video recording violates the Federal Rules and will also be unhelpful or  
 12 distracting to a jury, the Court denies Plaintiff's Motion.

### 13 CONCLUSION

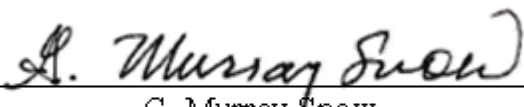
14 Because Plaintiff failed to comply with the Federal Rules of Civil Procedure, and  
 15 because the video recording is not in the proper view for use by a jury, the Court denies  
 16 the Motion. Accordingly, if Plaintiff intends to present Mr. Petronis by deposition, she  
 17 must use the Court Reporter transcript.

18 **IT IS HEREBY ORDERED** that Plaintiff's Motion in Limine to Permit Use of  
 19 Video of Scott Petronis Deposition and Request for Expedited Consideration (Doc. 79) is  
 20 **DENIED**.

21 **IT IS FURTHER ORDERED** that Plaintiff's Unopposed Motion to Reschedule  
 22 Oral Argument Currently Set for February 25, 2022 (Doc. 84) is **DENIED**.

23 **IT IS FURTHER ORDERED** vacating the telephonic conference scheduled for  
 24 February 25, 2022 (Doc. 83).

25 Dated this 16th day of February, 2022.

26   
 27 G. Murray Snow  
 28 Chief United States District Judge